STATE OF MICHIGAN

COURT OF APPEALS

CHATHAPURAM S. RAMANATHAN,

Plaintiff-Appellee,

v

WAYNE STATE UNIVERSITY BOARD OF GOVERNORS,

Defendant-Appellant,

and

LEON CHESTANG,

Defendant.

UNPUBLISHED
January 4, 2007

No. 266238
Wayne Circuit Court
LC No. 98-810999-NO

Before: Borrello, P.J., and Neff and Cooper, JJ.

PER CURIAM.

In this employment discrimination case, defendant Wayne State University Board of Governors[1] appeals by leave granted the trial court's reinstatement of plaintiff's action after the court had previously granted defendant's motion for summary disposition. We affirm in part and remand for further proceedings.

I

This case is before this Court for the second time. Plaintiff filed this action in April 1998, alleging that defendant discriminated against him on the basis of his Asian-Indian descent and retaliated against him for filing internal complaints with defendant's Equal Opportunity Office, contrary to the Civil Rights Act (CRA), MCL 37.2101 *et seq.* In a previous appeal, this Court partially reversed the trial court's grant of summary disposition in favor of defendant and

[1] Because this appeal is limited to plaintiff's claims against Wayne State University Board of Governors, we express no opinion regarding Chestang's individual liability under the CRA. Accordingly, this opinion will refer to Wayne State University Board of Governors merely as "defendant."

an individual defendant, Leon Chestang. See *Ramanathan v Wayne State Univ Bd of Governors*, unpublished opinion per curiam of the Court of Appeals, issued April 12, 2002 (Docket No. 227726) (*Ramanathan I)*. On remand, the trial court initially granted defendant's motion for summary disposition based on new authority, *Garg v Macomb Co Community Mental Health Services*, 472 Mich 263; 696 NW2d 646 (2005), amended 473 Mich 1205 (2005), but subsequently granted plaintiff's motion for reconsideration and reinstated the case.

II

This Court reviews de novo a trial court's decision on a motion for summary disposition to determine if the moving party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A trial court's decision on a motion for reconsideration is reviewed for an abuse of discretion. MCR 2.119(F)(3); *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000). "The rule allows the court considerable discretion in granting reconsideration to correct mistakes, to preserve judicial economy, and to minimize costs to the parties." *Kokx v Bylenga*, 241 Mich App 655, 659; 617 NW2d 368 (2000).

III

Defendant first argues that based on *Garg*, at a minimum, all claims other than plaintiff's claims for race discrimination and retaliation predicated on the denial of tenure are barred by the statute of limitations, MCL 600.5805, because they arise from acts that occurred before April 8, 1995, i.e., more than three years before plaintiff filed suit. Defendant requests that this Court direct the trial court to enter an order of summary disposition of all other claims. However, plaintiff concedes on appeal, as he did before the trial court, that in light of the holding in *Garg*, plaintiff no longer seeks recovery for actions other than the denial of tenure.

Because there is no dispute that plaintiff's sole remaining claim rests on the denial of tenure, we find the relief requested by defendant unnecessary. Plaintiff's affirmative representations to the trial court, and to this Court in the instant appeal, that he is no longer pursuing any claims other than those predicated on the denial of tenure, constitute an abandonment of any such other claims. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000); see *People v Riley*, 88 Mich App 727, 731; 279 NW2d 303 (1979) (defendant voluntarily abandoned motion by failure to pursue and instead entering a plea); cf. *In re Vanidestine*, 186 Mich App 205, 212; 463 NW2d 225 (1990) (counsel's stipulation before the trial court concerning trial proceedings is binding).

IV

Defendant next argues that it was entitled to summary disposition with respect to plaintiff's race discrimination and retaliation claims predicated on the denial of tenure because, under *Garg*, plaintiff may not rely on evidence of events that occurred outside the limitations period, such as the alleged anti-Asian Indian remarks of Dean Chestang in the fall of 1993, to factually support his claims. Accordingly, plaintiff cannot establish a claim of discrimination or retaliation. We disagree.

As discussed above, it is undisputed that *Garg* precludes plaintiff's reliance on acts that occurred before April 8, 1995, i.e., more than three years before plaintiff filed suit, as the basis of any discrimination or retaliation claim. However, we find no basis in *Garg* for a blanket exclusion of evidence in this case solely because the event at issue occurred outside the limitations period. Further, the per se rule advanced by defendant cannot be inferred from *Garg* given the Supreme Court's amendment of the opinion to delete footnote 14, which expressly sanctioned such blanket exclusion of evidence in claims under the CRA.

In *Garg*, the Supreme Court considered the viability of the continuing violations doctrine in light of the language of the statute of limitations, MCL 600.5805(1). The continuing violations doctrine permitted recovery for incidents that occurred outside the applicable limitations period, if an individual asserted a series of allegedly discriminatory acts or statements that were so sufficiently related that they constituted a pattern of harassment or discrimination and at least one of the acts alleged occurred within the limitations period. *Sumner v Goodyear Tire & Rubber Co*, 427 Mich 505, 538-539; 398 NW2d 368 (1986), overruled *Garg, supra* at 266; see also *Meek v Michigan Bell Telephone Co*, 193 Mich App 340, 343-345; 483 NW2d 407 (1992).

The *Garg* Court observed that the continuing violations doctrine was rooted in federal law that had no analogue in Michigan law. *Garg, supra* at 283-284. The Court specifically overruled *Summer* and held that "a person must file a claim under the Civil Rights Act within three years of the date his or her cause of action accrues, as required by §5805(10)." *Garg, supra* at 284. "An employee is not permitted to bring a lawsuit for employment acts that accrue beyond this period, because the Legislature has determined that such claims should not be permitted." *Id.* at 284-285.

In footnote 14 of its initial opinion in *Garg*, issued May 11, 2005, the Supreme Court majority directly addressed the admission of evidence of acts that occurred outside the limitations period, rejecting the proposition (advanced by the dissent) that "acts falling outside the period of limitations" were admissible "as background evidence in support of a timely claim." (Internal quotations omitted.) The trial court's grant of summary disposition in this case on July 6, 2005, was based on the initial opinion in *Garg*. However, the Supreme Court subsequently amended its opinion in *Garg* on July 18, 2005, by eliminating footnote 14.

Plaintiff moved for reconsideration of the trial court's grant of summary disposition, arguing that it was based in part on the trial court's reliance on footnote 14, which precluded evidence outside the limitations period, and that because footnote 14 had now been withdrawn, plaintiff should be permitted to proceed with his claim based on the denial of tenure. Plaintiff argued that because the "evidentiary component" of the *Garg* decision was eliminated, evidence of Dean Chestang's remarks and other alleged discriminatory or retaliatory conduct was admissible to support his denial of tenure claim.

Although acknowledging that the amendment of *Garg* created confusion in this case, the trial court agreed with plaintiff that the removal of footnote 14 was not meaningless, and therefore, contrary to the court's previous understanding, plaintiff could introduce into evidence acts outside the limitations period to support her denial of tenure claim. Accordingly, the court reinstated plaintiff's case.

We find no abuse of discretion in the trial court's decision to grant reconsideration. We agree that the implications of *Garg* are unclear with respect to the admission of evidence in other cases. Although the Court in *Garg* placed some significance on the statute of limitations in MCL 600.5805 when reviewing the evidence in that case, the question before the Court was whether the jury's verdict, based on alleged acts of retaliation, could be sustained under the standards for reviewing judgments notwithstanding the verdict. *Garg, supra* at 271-272. The evidence was viewed in a light most favorable to the plaintiff to determine if she could establish a claim for unlawful retaliation occurring within the limitations period. *Id.* at 272, 278.

Despite the language in *Garg*, referencing limitations on the admissibility of evidence in that case, we cannot read the amended opinion so broadly as to exclude per se all background evidence of alleged discriminatory or retaliatory acts occurring outside the limitations period. Absent clear guidance in this regard from the Supreme Court, we conclude that this evidence is subject to the rules of evidence and other applicable governing law, and its admissibility is within the discretion of the trial court.

V

Defendant argues alternatively that even if consideration of discrimination or retaliation outside of the statute of limitations is not foreclosed by *Garg*, defendant is nonetheless entitled to summary disposition of plaintiff's denial of tenure claim on the basis of evidence subsequently discovered and precedent established by Supreme Court cases decided after this Court's earlier decision in this case. Defendant contends that plaintiff cannot establish a prima facie case of discrimination or retaliation given these new facts and precedent, the consideration of which is not barred by the law of the case doctrine.

A

Whether the law of the case doctrine applies is a question of law subject to de novo review. *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001). The law of the case doctrine provides that "if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same." *Grievance Administrator v Lopatin*, 462 Mich 235, 259; 612 NW2d 120 (2000), quoting *CAF Investment Co v Saginaw Twp*, 410 Mich 428, 454; 302 NW2d 164 (1981). The doctrine is applied without regard to the correctness of the prior determination. *Grace v Grace*, 253 Mich App 357, 363; 655 NW2d 595 (2002). But the doctrine applies only to issues actually decided, expressly or implicitly, in the prior appeal. *Grievance Administrator, supra* at 260. "The doctrine will not be applied if the facts do not remain materially or substantially the same or if there has been a change in the law." *Grace, supra* at 363.

"The appellate court's decision likewise binds lower tribunals because the tribunal may not take action on remand that is inconsistent with the judgment of the appellate court." *Grievance Administrator, supra* at 260. A trial court may take such action as the law and justice require so long as the action is not inconsistent with the appellate court's judgment. *K & K Constr, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 544; 705 NW2d 365 (2005).

B

Defendant argues that under the stray remarks test adopted in *Garg*, Dean Chestang's two comments that this Court earlier held to be direct evidence of discrimination, are clearly insufficient to establish discrimination. Further, because this Court failed to apply the test relied on in *Garg*, the law of the case doctrine is inapplicable.

Defendant has not established that the decision in *Garg* resulted in a change in the law with respect to the evidence applicable to plaintiff's denial of tenure claims. Likewise, we are not persuaded that our Supreme Court's order in *Dep't of Civil Rights ex rel Burnside v Fashion Bug of Detroit*, 473 Mich 863; 702 NW2d 154 (2005), or that its decisions in *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124; 666 NW2d 186 (2003) or *West v Gen Motors Corp*, 469 Mich 177; 665 NW2d 468 (2003), established any change in the law affecting this Court's prior decision.[2] Further, Marilyn Williamson's June 18, 2004, deposition testimony does not establish a material change in the facts. Although Williamson's testimony, if believed, provides support for Wayne State's position regarding the absence of causation, evidence that Chestang was not the ultimate decision maker, but rather made a negative recommendation that plaintiff's tenure application be denied, existed when this Court previously decided this matter.

Absent a change of law or material facts, we conclude that the law of the case doctrine applies. Under that doctrine, regardless of the correctness of this Court's prior decision, plaintiff established a genuine issue of material fact for trial with respect to his CRA claim based on the denial of tenure. *Grace, supra* at 362-364. Moreover, the trial court declined to revisit these issues as a basis of defendant's motion for summary disposition under MCR 2.116(C)(10). Defendant has failed to show error in this regard.

Affirmed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Janet T. Neff
/s/ Jessica R. Cooper

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[2] We decline to address defendant's argument in its reply brief that the accrual date for plaintiff's denial-of-tenure claims is the date when Chestang made a negative recommendation, pursuant to *Joliet v Pitoniak*, 475 Mich 30; 715 NW2d 60 (2006). Aside from the fact that this Court previously addressed this point in the original appeal, *Ramanathan I, supra*, slip op, p 3, "[r]eply briefs may contain only rebuttal argument, and raising an issue for the first time in a reply brief is not sufficient to present the issue for appeal." *Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241, 252; 673 NW2d 805 (2003).